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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No.

JOSEPH CAREY, ET AL. (COMPLAINANTS BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD),

Petitioners,

v.

LODGE 78 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

PETITION OF INDIVIDUAL COMPLAINANTS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Individual Complainants pray that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above entitled case October 4, 1960, on which rehearing was denied November 29, 1960.

CITATIONS TO OPINIONS BELOW

The opinion in the above entitled case is printed in 11 Wis. 2d 292, 105 N.W. 2d, and is printed in the appendix hereto (infra, p. 20).

The opinion of the Circuit Court for Milwaukee County, Wisconsin, was reported in (46 L.R.R.M.) 2628. The basic order of the Wisconsin Employment Relations Board, was affirmed by the Circuit Court of Milwaukee County, Wisconsin, and reversed by the Wisconsin Supreme Court.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered October 4, 1960. A timely motion for a rehearing was denied by an order dated November 29, 1960 (Appendix, infra, p. 20). Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), 62 Stat. 929.

QUESTIONS PRESENTED

QUESTION I

Does the proviso, as a limitation of the prohibition of section 8(b)(1)(A) of the LMRA, constitute pre-emption by the Act of rule making activity of a labor organization "with respect to acquisition or retention of membership therein"?

QUESTION II

Does the use of the words "right of a labor organization" in the proviso to Section 8(b)(1)(A) of the LMRA create the absolute right of a labor organization to make and enforce its rules "with respect to acquisition or retention of membership therein" and thus pre-empt all regulatory control by the states of such activity of a labor organization?

QUESTION III

Is the imposition of a fine by a labor organization for exercise by a member of a right guaranteed by Section 7 of the LMRA, an unfair labor practice under Section 8(b)(1)(A) of the Act or instead, is it a rule making activity of a labor organization "with respect to retention of membership therein" and therefore covered by the proviso to Section 8(b)(1)(A) as a limitation of that Section?

NOTE: The first two questions arise out of the decision of the Wisconsin Supreme Court in this case, and the third out of a recent decision of the United States Circuit Court for the Seventh Circuit in the *Allen-Bradley* case (infra). It is included in this petition so that this Court may consider its possible pertinency and far reaching effect.

STATUTES INVOLVED

This case involves the following statutes: National Labor Relations Act, as amended, (29 U.S.C. 151 et seq., 61 Stat. 136, as amended)—

> *"Rights of Employees*
>
> *"Sec. 7.* Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8(b)(1)(A). It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;*"

"*Prevention of Unfair Labor Practices*

"Sec. 10. (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . ."

Wisconsin Employment Peace Act, Wisconsin Statutes, 1959—

"*Section 111.04 Rights of Employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

"Section 111.06(2). It shall be an unfair labor practice for an employe individually or in concert with others:

(a) to coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04 * * *.

ABBREVIATIONS

Wisconsin Employment Peace Act.....Wisconsin Act

Wisconsin Employment Relations Board.....Wisconsin Board

National Labor Relations Act.....LMRA

National Labor Relations Board.....NLRB

STATEMENT OF THE CASE

The Complainants, who were employees of Allen-Bradley Company of Milwaukee, Wisconsin and members of the Respondent union, elected to work for the said company during a strike called by the Respondent union against the said company.

Fines in the amount of $100.00 were assessed against each of the Complainants and civil suits were commenced —and are pending—in Civil Court of Milwaukee County to collect such fines.

Thereafter, complaints were filed by the Complainants before the Wisconsin Board alleging commission of an unfair labor practice under section 111.06(2)(a) of the Wisconsin Act by the Respondent.

The Wisconsin Board ordered the Respondent to desist from punishing, or threatening to punish, employee members for working during a strike. (R. 189, infra.)

Upon review the Circuit Court of Milwaukee County held that the Wisconsin Board had jurisdiction of the case and affirmed the order of the Wisconsin Board.

Upon appeal the Wisconsin Supreme Court reversed the judgment below on the sole ground that the LMRA pre-empted the regulation provided by the Wisconsin Act in this case.

REASONS FOR GRANTING THE WRIT

In its decision in this case the Supreme Court of Wisconsin made interpretations of the LMRA which involve constitutional questions of pre-emption by federal law of state law enacted by states under their police power and of the jurisdiction of the NLRB under Section 10(a) of the LMRA.

Both are vitally important constitutional questions because they affect the reserved constitutional rights for all the states. For that reason alone they could merit the consideration of the United States Supreme Court under certiorari.

Additional reasons for the grant are that the decision was reached by the Wisconsin Supreme Court—

1. without regard to the fundamental concept of pre-emption by federal law of the underlying labor law enacted by states under their police power;
2. in direct conflict with decisions of this Court; and
3. based on the misconception that the word "protected", as used in certain decisions of the NLRB, meant "pre-empted—where the question of pre-emption was not in issue.

A further reason is that the decision would have the following far-reaching anti-social effects:

1. It would give labor organizations the opportunity through the device of fines, or other disciplinary action —threatened or accomplished—to prescribe undemocratic, coercive, anti-civil liberty rules affecting their

members, free from control of protective state laws and thus precluding states from exercising their traditional jurisdiction with reference to rights of individuals.

2. It would have the discriminatory effect of giving employees engaged in *intra*-state commerce the benefit of protective state labor laws while at the same time withholding that protection from employees engaged in *inter*-state commerce.

3. It would permit a labor organization to nullify anti-discrimination (FEP) state labor laws by prescribing rules which would bar membership in a labor organization on account of color, race or creed.

QUESTION I

Does the proviso, as a limitation of the prohibition of Section 8(b)(1)(A) of the LMRA, constitute preemption by the Act of rule making activity of a labor organization "with respect to acquisition or retention of membership therein"?

The scope of the proviso is any rule of a labor organization with respect to retention or acquisition of membership therein. Thus every rule of a labor organization, the enforcement of which could affect retention or acquisition of membership, would be a rule *"with respect to retention or acquisition of membership therein."* Accordingly, every such rule would be within the scope of the proviso.

Obviously every rule which prevented access to membership on the ground of race, color or creed would automatically prevent the exercise by employees of their rights provided for in section 7 of the Act.

Likewise, every union member could be excluded from the exercise of the rights in section 7 through the operation of a rule forbidding the exercise of any such right upon penalty of expulsion from the union for violation of the rule.

Therefore, the practical effect of the proviso is to permit complete nullification of the prohibition of section 8(b)(1)(A) in protecting the exercise of rights of employees under section 7. In that way, the unfair labor practice contained in the words of section 8 (b)(1)(A) ceases to exist *in fact*.

Thus the proviso creates a vacuum of regulation with respect to the union rule making activity in question.

The decision of the Wisconsin Supreme Court in this case holds, in effect, that the LMRA pre-empts (and hence excludes) regulation by the States in the vacuum of regulation of the LMRA with respect to the union rule making activity in question.

The decision of the Wisconsin Supreme Court in so holding is in conflict with the fundamental concept of "pre-emption" by federal law of underlying regulation of employment relations by states under their police power.

This Court in *Holden vs. Hardy*, 169 U.S. 366 (1898), and related decisions, in removing the legal blocks to state regulation of employment contained in Section 10 of Article I of the United States Constitution, and the 14th Amendment, created the basic law of the land with reference to employment relations by permitting enactment of state labor laws under the police power in the public interest.

Those state laws represent the basic regulation affecting all private employment relations except where fed-

eral law pre-empts an area of state regulation. Such state laws apply to all private employment relations—intra-state or inter-state—until this Court authoritatively decides under the requirement of "due process" that a federal law pre-empts an area of regulation in which state regulation is functioning.

"To pre-empt" (according to Webster) means "to appropriate; to seize upon to the exclusion of others." Thus, pre-emption should occur only if the language of the federal law contains clear, positive, affirmative language indicating the purpose of *seizing* a given area of regulation to the exclusion of state control under its police power.

The language of the proviso does not convey any semantic indication of aggressive seizure of the area of the union rule making in question to the exclusion of state regulation. The words of the proviso are phrased in the negative. Thus, taken literally, the words convey the meaning merely that the "paragraph" (Section 8 (b) (1) (A)) shall not prevent unions, by the rule making in question, from coercing employees in the exercise of their rights guaranteed in Section 7.

In their normal meaning those words do not apply to any regulatory mechanism other than the unfair labor practice in Section 8(b) (1) (A). The words limit the power of the NLRB as the implementing authority for "prevention of unfair labor practice."

That power has its source in Section 10(a) of the LMRA reading in part as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. * * *"

Without the implementing mechanism of the regulatory prohibition of section 8(b)(1)(A), the NLRB would be powerless to protect the rights of employees granted in Section 7 against the said rule making activity of labor organizations.

Thus, in this case the power of the NLRB to protect the rights granted in Section 7 is commensurate with the scope of the unfair labor practice created by section 8(b)(1)(A) *as limited by the proviso.* But that "scope" is *zero* with respect to the union rule making in question.

Simply stated, the proviso creates a vacuum of regulation within the *scope of the proviso.* A vacuum of regulation, in other words the absence of regulation, does not have the pre-emptive attribute of "seizing upon to the exclusion of others." On the contrary, it creates an area not regulated by federal law. Therefore, the proviso cannot constitute a pre-emption of regulation by states of union rule making with respect to acquisition or retention of membership.

The following cited decisions of this Court with which the decision of the Wisconsin Court is in conflict, are in consonance with the fundamental concept of pre-emption above outlined.

The decision of the Wisconsin Supreme Court is in conflict with this Court's rule in Algoma Plywood v. WERB (1949) (336 U.S. 301), holding that section 8(a)(3) of the LMRA, a negative proviso phrased similarily to that of the proviso in section 8(b)(1)(A), has no pre-emptive effect.

This Court said:

> "It is argued, therefore, that a State cannot forbid what section 8(a)(3) affirmatively permits. The

short answer is that section 8(a)(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement."

Application of that rule in this case would mean that Congress, through the enactment of the proviso to section 8(b)(1)(A), has declared that such section does not apply to the union rule making in question and by that declaration has merely disclaimed a national policy hostile to such union activity.

The Wisconsin Supreme Court's decision disregarded the test of pre-emption established by this Court in San Diego Buildings Trade v. Garmon (1959) (359 U.S. 236) which, in relation to Question 1, is as follows:

> "When it is clear or may be fairly assumed that the activities which a State purports to regulate * * * *constitute an unfair labor practice under Section 8*, due regard for the federal enactment requires that State jurisdiction must yield."

Under that test the proviso to Section 8(b)(1)(A) is not pre-emptive because the proviso does not constitute an unfair labor practice in section 8(b)(1)(A), but, on the contrary, constitutes a limitation on the unfair labor practice in such section. Therefore, the proviso does not constitute pre-emption of state regulation within the scope of the proviso.

The decision of the Wisconsin Supreme Court is in conflict with the decision of this Court in *International Association of Machinists vs. Gonzales*, 356 U.S. 617 (1958) at page 620.

That decision is decisive of the proposition that the proviso is merely a limitation of the coverage of Section 8(b)(1)(A) and hence is not pre-emptive of state regulation.

This Court said:

> "But the protection of union members from arbitrary conduct by union and union officer has not been undertaken by Federal law, and indeed, the assertion of any such power has been expressly denied. The proviso to Section 8(b)(1)(A) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein.'"

QUESTION II

Does the use of the words "right of a labor organization" in the proviso to Section 8(b)(1)(A) of the LMRA create the absolute right of a labor organization to make and enforce its rules "with respect to acquisition or retention of membership therein" and thus pre-empt all regulatory control by the states of such activity of a labor organization?

The basis for the decision of the Wisconsin Supreme Court is found in the following quotations from its opinion.

On page 13 appears the statement:

> "There are at least three decisions of the NLRB in which it has been called upon to interpret the effect of such proviso."

After discussing the three cases that Court said:

> "The foregoing quotations from decisions of the National Labor Relations Board make it abundantly clear that such board interprets the proviso as having the effect of making the enforcement by a union of its own constitution and by-laws a protected activity under the Labor Management Relations Act. We deem that such interpretation is certainly a permi-

> sible one in view of the use by Congress of the word 'right' in the proviso when referring to the union activity of prescribing rules for acquisition and retention of membership."

And then the opinion ends with these words:

> "Therefore, we conclude that such interpretation by the National Labor Relations Board is controlling on the issue of pre-emption, and that W.E.R.B. was without jurisdiction in the instant proceedings."

Thus, the Wisconsin Supreme Court held that the proviso has the effect of making enforcement by a union of its own rules a pre-empted area of regulation under the Act because (1) the NLRB has so held in three cases hereinafter cited, and (2) because of the use of the word "right" in the proviso.

The NLRB did not hold in the three cases hereinafter cited that the union activity of rule making with respect to acquisition or retention of membership was a "protected" activity in the technical sense of "pre-emption."

The three cited cases are: *International Typographical Union* (1949), 86 NLRB 951; *Minneapolis Star and Tribune Co.* (1954), 109 NLRB 727; *Allen-Bradley Company* (1960), 127 NLRB No. 8.

In both the *Typographical Union* and *Minneapolis Star* cases the issue was whether the union activity complained of was unfair labor practices under 8(b)(1)(A). There was no issue concerning any regulation by a state law of the area of the "proviso". Thus the issue in those cases was the "effect" of the "proviso" in relation to the prohibitory regulation of Section 8(b)(1)(A). The Board held that the union activity in question —although coercive— was an activity within the area ex-

pressly excluded from the regulatory coverage of Section 8(b)(1)(A):

In the structural pattern of the LMRA certain rights of employees are created in Section 7. The protection of those rights is through the creation of the unfair labor practices in Section 8. The NLRB is empowered by Section 10(a) "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce."

—Thus, in those cases the Board was empowered to determine whether *any person* had committed an unfair labor practice under Section 8(b)(1)(A) *as limited by the proviso.*

The Board found that the union had not committed an unfair labor practice because the proviso had limited the scope of 8(b)(1)(A) so that it did not cover the union rule making activity complained of, even though it was coercive of the exercise of rights in Section 7.

In order to carry out its responsibility under Section 10(a), the Board was required only to determine whether or not the union activity in question constituted an unfair labor practice under Section 8(b)(1)(A) as limited by this proviso.

The Board did not pass upon any question of pre-emption because pre-emption was not in issue. Furthermore, it is doubtful that the Board, under the power granted it by Section 10(a), would have the jurisdictional authority to pass on any question of pre-emption arising out of the limiting effect of the proviso.

In any event, the final authority upon the question of pre-emption under the requirement of due process rests with this Court.

In the *Allen-Bradley* Case (supra) a decision handed down on February 9, 1961, United States Court of Appeals for the Seventh Circuit reversed the decision of the NLRB. Thus the basis for the Wisconsin Supreme Court's decision (characterized by that Court as "controlling") completely disappears.

The use of the word "right" in the context of the proviso does not create the absolute right of a labor organization to make rules with respect to acquisition or retention of membership to the exclusion of regulatory control of the states.

For easy reference the proviso is re-stated:

> "Provided that this paragraph (8(b)(1)(A)) shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

The traditional source of rights of organizations like labor organizations is the common law and statutes of the governing state. This is the view of this Court in the *Gonzales* case (supra) as interpreted by Professor Archibald Cox in the 1958 Report of Section of Labor Relations of American Bar Association in the following language:

> "Mr. Justice Frankfurter, speaking for the majority, reasoned from the undisputable premise that the federal law neither deals with the rights of union membership nor precludes a state from exercising its traditional jurisdiction to define such rights and remedy violation."

Accordingly, the proviso (with this ellipsis supplied) would read like this:

> "Provided that, this paragraph shall not impair the right of a labor organization to prescribe its own

rules * * *, *as such right exists under the law of the governing state.*"

With this interpretation the words "right of a labor organization" in the proviso would not be pre-emptive in effect but instead *implicitly* non-pre-emption.

Also, the word "right" is not susceptible of being construed as pre-emptive because in its context it has the same meaning and function whether or not the right is considered pre-emptive or non-pre-emptive. In either case, the union activity of rule making with respect to acquisition or retention of membership is outside the coverage of the unfair labor practice in Section 8(b)(1)(A). Furthermore, the key to the interpretation of the proviso is not the word "right" but *union rule making activity with respect to acquisition or retention of membership*. Accordingly, the words "right of a labor organization" can have no pre-emptive meaning within the fundamental concept of pre-emption as discussed under Question I.

The decision of the Wisconsin Supreme Court in this case holding that the use of the words "right of a labor organization" has the effect of pre-empting regulation by the states of the union activity of making rules "with respect to acquisition or retention or membership therein" is in conflict with the decisions of this Court cited in the discussion under Question I, namely the *Algoma* case (supra), the *Garmon* case (supra) and the *Gonzales* case (supra).

It is of significance that the decision of the Wisconsin Supreme Court in this case is in direct conflict with its recent decision in Ross vs. Ebert (1957) 275 Wis. 253.

In that case the Wisconsin Supreme Court interpreted and applied state law in relation to the rights of individuals under union rules "with respect to acquisition of membership therein."

The issue in that case was whether a union rule excluding negroes from membership was invalid under an FEP statute of the state. The Court held the discriminatory union rule valid because the Wisconsin statute did not contain injunctive enforcement machinery and *not because* the proviso to Section 8(b)(1)(A) pre-empted state regulation of union rule-making in that area.

If, in the *Ross* case, the Wisconsin Supreme Court had followed its decision in this case to the effect that the LMRA pre-empts regulation of the union rule in question, the Court would have been without jurisdiction to pass on the issue presented in the *Ross* case. Its jurisdiction would have been limited to deciding that it had no jurisdiction because of the pre-emption of state regulation by the LMRA.

QUESTION III

Is the imposition of a fine by a labor organization for exercise by a member of a right guaranteed by Section 7 of the LMRA, an unfair labor practice under Section 8(b)(1)(A) of the Act or instead, is it a rule making activity of a labor organization "with respect to retention of membership therein" and therefore covered by the proviso to Section 8(b)(1)(A) as a limitation of that Section.

In the *Allen-Bradley* Case (supra) the United States Court for the Seventh Circuit stated as follows:

> This case might well be disposed of on the basis of what we have said. However, the Board strenu-

> ously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Sec. 8(b)(1)(A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion." We assume that a union has broad powers in prescribing rules relative to the acquisition and retention of its members. However, that power, in our view, is not absolute. It goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act. Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union.

Thus, that Court seems to hold, whether as one of two bases for its decision or by dictum, that a fine imposed by a labor organization upon a member thereof for exercising a right guaranteed by Section 7 constitutes an unfair labor practice under Section 8(b)(1)(A) of the Act.

CONCLUSION

For the foregoing reasons your petitioner prays that the petition for certiorari be granted.

HAROLD W. STORY
JOHN H. WESSEL

Attorneys for
Individual Complainants

Date: February 22, 1961

APPENDIX

WISCONSIN SUPREME COURT DECISION IN LOCAL 248 vs. W.E.R.B.

October 4, 1960

APPEAL from two judgments of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Reversed.*

In Case No. 59, Local 248, United Automobile, Aircraft & Agricultural Implement Workers of America, A.F.L.-C.I.O. (hereinafter referred to as the "union"), instituted a proceeding for review, pursuant to the Wisconsin Administrative Procedure Act (ch. 227, Stats.), of an order entered by the Wisconsin Employment Relations Board (hereinafter referred to as "W.E.R.B."). In Case No. 60, W.E.R.B. petitioned the circuit court pursuant to sec. 111.07(7), Stats., for enforcement of the order as to which review was sought by the union in Case No. 59. The two proceedings were consolidated by the circuit court for the purpose of hearing and determination.

At all times material to the instant litigation the union was the exclusive collective-bargaining agent for the production and maintenance employees of the Allis Chalmers Company (hereinafter referred to as the "company") at its plant in the city of West Allis, having been so certified by the National Labor Relations Board. On August 15, 1958, the labor agreement existing between the union and the company expired. After protracted negotiations between the parties with respect to the terms of a renewal agreement an impasse was reached. Thereupon, the executive board of the union on February 2, 1959, called a strike. This strike had been previously authorized by a

secret ballot taken of the members of the union on August 13, 1958. The strike terminated on April 20, 1959, when a new labor agreement was entered into between the parties.

During the strike the union picketed the company's plant. There is no claim made that such picketing was anything but peaceful. While the strike was in progress the company kept its plant open and work was available for any employee who wished to avail himself of it. Certain members of the union crossed the picket line and continued to work in the plant. At a well-publicized union meeting held February 7, 1959, the president of the union had warned that any member who crossed the picket lines and worked during the strike would be tried by the union and fined after the strike ended. Later, letters dated February 24, 1959, were sent out by the executive board of the union to a number of the members who had crossed the picket lines and continued to work for the company. These letters pointed out that such action constituted a violation of the union's constitution and by-laws and subjected each violator to a fine up to $100 for each offense, and that each day worked might well constitute a separate offense.

Following settlement of the strike, charges were filed with the union against the offending members who had crossed the picket lines and continued to work. Trial committees were chosen to try such offenders. Before completion of such trials, the company and 19 union members, who were then being tried, filed a complaint with W.E.R.B. charging that the union's conduct constituted coercion of the individual complainants in the exercise of their rights under sec. 111.04, Wis. Stats., and that the union had been guilty of an unfair labor practice under sec. 111.06(2)(a), Wis. Stats.

In the trials before the union trial committees, the offending members were represented by counsel. All 19, who were complainants in the W.E.R.B. proceeding, were found guilty and fined in various amounts ranging from $10 to $100 each. No claim is made that such trials and fines did not conform to the provisions of the union's constitution and by-laws.

The by-laws of the union do not permit resignation from membership except during a ten-day period prior to January 1st of each year. The last period for withdrawal from union membership prior to the strike expired January 1, 1959.

W.E.R.B. conducted a hearing with respect to the complaints filed which charged that the union had been guilty of an unfair labor practice. Under date of September 28, 1959, W.E.R.B. entered its findings of fact, conclusions of law, and order wherein it was determined: (1) That the activities of the union were "neither prohibited by, nor protected by the Labor Management Relations Act, 1947, as amended;" (2) that such activities, whereby the union had threatened to impose fines upon the individual complainants who had crossed the picket lines, constituted an attempt to coerce the latter and other employees similarly situated in the enjoyment of legal rights guaranteed by sec. 111.04, Wis. Stats.; and (3) that the union immediately cease and desist from threatening any employee of the company with punishment by imposition of a fine because such employee had crossed a picket line. One of the three members of W.E.R.B. filed a dissenting memorandum in which he held that there was federal pre-emption which prohibited state action, and expressed the further opinion that, even if W.E.R.B. had jurisdiction, the charged activities of the

union would not constitute an unfair labor practice under ch. 111, Wis. Stats. Subsequently an amended cease-and-desist order was entered dated October 27, 1959.

The union timely instituted proceedings for review in the circuit court for Milwaukee county, and W.E.R.B. applied to such court for enforcement of its amended order. After a hearing, the circuit court filed a memorandum opinion upholding the determination made by the majority members of W.E.R.B. Judgments were accordingly entered under date of April 22, 1960, one of which dismissed the union's petition for review, and the other decreed enforcement of W.E.R.B.'s amended order. From such judgments the union has appealed to this court.

For the appellant there was a brief by *Raskin, Zubrensky & Padden* of Milwaukee, attorneys, and *Max Raskin* and *Leonard S. Zubrensky* of Milwaukee, and *Harold A. Cranefield* of Detroit, Michigan, of counsel, and oral argument by *Max Raskin* and *Leonard S. Zubrensky*.

For the respondent Wisconsin Employment Relations Board the cause was argued by *Beatrice Lampert*, assistant attorney general, with whom on the brief were *John W. Reynolds*, attorney general, and *Jay Schwartz*, attorney.

For the respondent Allis-Chalmers Manufacturing Company there was a brief by *John G. Kamps, James Urdan*, and *John L. Waddleton*, attorneys, and *Quarles, Herriott & Clemons* of counsel, all of Milwaukee, and oral argument by *Mr. Kamps*.

A brief *amicus curiae* was filed by *Goldberg, Previant & Cooper* of Milwaukee, for the Wisconsin State A.F.L.-C.I.O.

GURRIE, J. The parties have stipulated that the company is engaged in business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947. The principal issue on this appeal is whether there exists federal pre-emption under such act which would preclude W.E.R.B. from exercising any jurisdiction over the activities of the union which were the subject of the complaints before it. A second issue is presented as to whether such activities constituted conduct prohibited by the Wisconsin Employment Peace Act (ch. 111, Wis. Stats.), in the event it should be determined that there is no federal pre-emption. Because of the disposition made of the pre-emption issue we find it unnecessary to pass on such second issue.

In resolving the issue of pre-emption it is essential that we first examine the pertinent provisions of the Labor Management Relations Act and the Wisconsin Employment Peace Act. We deem these to be the following:

Sec. 7 of the Labor Management Relations Act, 29 USCA, p. 235, sec. 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in sec. 158(a)(3) of this title."

Sec. 8 (b)(1) of the Labor Management Relations Act, 29 USCA, p. 258, sec. 158(b)(1):

> "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sec. 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."

Sec. 111.04, Wis. Stats.:

"Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Sec. 111.06(2)(a), Wis. Stats.:

"It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in sec. 111.04; or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

An examination of the above-quoted statutory provision discloses that sec. 111.04, Wis. Stats., provides substantially the same as does sec. 7 of the Labor Management Relations Act. Likewise sec. 111.06(2)(a), Wis. Stats., corresponds closely to the afore-quoted portion of sec. 8 (b)(1) of the Labor Management Relations Act except for the proviso provision of the latter, which reads as follows:

"*Provided*, That this paragraph shall not *impair the right* of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;" (Italics supplied.)

The parties concede that a fine imposed by a union pursuant to its constitution and by-laws upon a member, who has violated such constitution and by-laws by crossing a picket line during a strike in order to continue his employment, is a union activity embraced within the scope of such proviso. If it were not, then there clearly would be pre-emption because, if the union conduct at issue here constitutes illegal coercion, it would be prohibited under the Federal Act as well as the Wisconsin Employment Peace Act. Therefore, the crucial question is whether the congress by insertion of such proviso intended to make such an activity a protected one, or whether it intended that such union conduct should remain outside of the scope of congressional regulation so that the states might regulate it if they so desire. It is the latter interpretation that was adopted by the majority members of W.E.R.B. and the trial court.

One of the more-recent, as well as informative, decisions of the United States supreme court on the issue of pre-emption under the Labor Management Relations Act is that of *San Diego Unions v. Garmon* (1959), 359 U. S. 236, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775. The test of pre-emption in the labor-relations field laid down in that decision is whether the activity (p. 246), "is arguably within the compass of sec. 7 or sec. 8 of the [Labor Management Relations] Act." If it is, then the state's jurisdiction is displaced and the issue must be decided by the National Labor Relations Board and not by the court or the states. This is because that is the agency which the congress has clothed with authority to determine such issue. The failure of such board to define the legal significance under the act of a particular activity does not give the states

power to act. Of particular signifiance is the following statement appearing at page 246 of the opinion:

> "The governing consideration is that to allow the states to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In such decision in the *Garmon Case* the United States supreme court did point to a type of activity that is not arguably within the compass of secs. 7 and 8 of the Labor Management Relations Act when it declared (pp. 243, 244):

> "However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the the states of power to regulate where the activity regulated was *a merely peripheral concern* of the Labor Management Relations Act. See *International Asso. of Machinists v. Gonzales*, 356 U. S. 617 [78 Sup. Ct. 923, 2 L. Ed. (2d) 1018]." (Emphasis supplied.)

The afore-quoted statement, with its reference to the *Gonzales Case*, is most pertinent because such case has been cited by counsel on both sides of the instant appeal, and in the memorandum opinion of the learned trial judge. In that case Gonzales brought suit against the union in a California state court for restoration of his union membership and for damages, claiming that his expulsion from the union violated the union constitution and by-laws. Gonzales secured judgment in his favor which was affirmed by the California district court of appeals. The California supreme court refused to accept an appeal to it, and the union then appealed to the United States supreme court. There the union did

not question that part of the judgment which restored membership to Gonzales, but contended that there was federal pre-emption under the Taft-Hartley Act which precluded the state court from granting relief in the form of damages. The United States supreme court disposed of such argument by stating (pp. 621, 622):

> "The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions."

In the case of *United Automobile, A. & A. I. Workers v. Woychik* (1958), 5 Wis. (2d) 528, 93 N. W. (2d) 336, this court affirmed the judgment of the trial court in favor of the plaintiff union in an action to collect a fine against a union member for failure to picket during a strike. The union constitution and by-laws provided for the imposition of such a fine. Such provisions of the union constitution and by-laws were held to constitute a contract which the union was entitled to enforce by court action. Under the wording of the proviso of sec. 8(b)(1)(A) of the Labor Management Relations Act, such a contract does not fall within the prohibitions of such act. The afore-quoted extract from the decision of the United States supreme court in *International Asso. of Machinists v. Gonzales, supra,* clearly indicates that the enforcement by state courts of rights arising

under such a contract is too remotely related to the public interest sought to be protected by the Labor Management Relations Act to require a holding that there exists pre-emption under such act.

The matters of public interest with which the congress sought to deal in enacting such act are clearly made manifest by sec. 1 thereof, 29 USCA, p. 150, sec. 151. One expressed purpose of such enactment was to correct the "*inequality of bargaining power* between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" by encouraging and protecting the exercise by workers in employments affecting interstate commerce of free collective bargaining.

When the provisions of sec. 7, together with that of the proviso of sec. 8(b)(4)(A), of the act are construed together, it can well be argued that the congress has spelled out the balance of bargaining power it desires to maintain between unions and employers in employments affecting interstate commerce. This being so, then any attempt by the states to regulate union activity in such a way as to disrupt such balance would be an invasion of a field of regulation already pre-empted by the congress. This is the view voiced by Professor Archibald Cox of Harvard Law School, a an address to the section of Labor Relations Law of the American Bar Association at its 1958 annual meeting (Report of the 1958 Proceedings of such section, page 21):

> "Freedom to strike, to picket, and to use other economic weapons affects the progress of union organization and the balance of power in collective bargaining. The progress of unionization and the balance of power affect the way collective bargain-

> ing works. . . . Since freedom to negotiate terms of employment implies freedom to reject the terms proposed by the other party, the framework necessarily includes the law of strikes and picketing. At each point formulating the national labor policy involved balancing the various interests of management, union, employees, and public in union organization and collective bargaining as methods for establishing terms and conditions of employment. Any state law which affects the balance is inconsistent with the national labor policy embodied in the L.M.R.A. and, under the supremacy clause, cannot be applied in situations affecting interstate commerce."

A union without power to enforce solidarity among its members, when it resorts to a strike in an effort to force an employer to agree to its collective-bargaining demands, is a much-less-effective instrument of collective bargaining than a union which possesses such power. Therefore, there is an intimate connection between the right of a union to fine members, who cross a picket line in order to continue to work during a strike called by the union, and the incidents of collective bargaining sought to be regulated by the Labor Management Relations Act. In view of this, it is difficult for us to conceive that such union activity is of "a merely peripheral concern of the Labor Management Relations Act."

That there is an intimate connection between the ability of a union to fine a member, who crosses a picket line in order to continue to work during a strike called by the union, and collective bargaining is supported by an opinion rendered by the court of appeals for the Sixth circuit in *Sanders v. International Asso. of Bridge, Structural & Ornamental Iron Workers* (1956), 235 Fed. (2d) 271. There the court had before it the issue of the legality of a provision in a union constitution which was broad

enough in scope to permit the expulsion for life of a member found guilty of violating certain other provisions of such constitution. The plaintiff Sanders had been so expelled for life. In passing on such issue the court declared (p. 272):

> "... the legal right of the union to take such action is recognized in the Labor Management Act, 29 USCA, sec. 158(b)(1)(A), where is is provided the the law 'shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.' The expulsion and debarment of appellant Sanders for life was a valid exercise by the union of its powers under its constitution and a legal exercise of its rights under the pertinent statute. As has been well said, '*A union must have authority to discipline its members, otherwise it will have no power to bargain effectively.* [Citing note in Villanova Law Review, January, 1956, p. 190.]" (Emphasis supplied.)

Thus it is apparent that the arguments, in favor of holding that the activity of a union which fines a member for crossing a picket line in violation of the union's constitution and by-laws is protected by the Labor Management Relations Act, are too potent to permit us to determine that such activity is not "arguably within the compass of secs. 7 or 8 of the act." This being the case, no state agency or court, but only the National Labor Relations Board, has jurisdiction to determine whether such activity is protected by the proviso of sec. 8(b)(1)(A) of the act. *San Diego Unions v. Garmon, supra.*

There are at least three decisions of the National Labor Relations Board in which it has been called upon to interpret the effect of such proviso.

The first of these is *International Typographical Union* (1949), 86 N.L.R.B. 951. In that case one of the activities of the union, which was contended to be an act of coercion prohibited by sec. 8(b)(1)(A) of the act, was threatening union members with expulsion if they failed to follow certain union-prescribed, collective-bargaining procedures. The National Labor Relations Board held that such "argument is squarely at odds with the unambiguous language of the proviso to sec. 8(b)(1)(A), and the legislative scheme as a whole, and must therefore be rejected." By footnote to this holding the board quoted the language of such proviso and stated (p. 957):

> "It is unnecessary to do more than to mention the *guarantee of a right* to 'prescribe' rules extends to the enforcement of such rules as well." (Emphasis supplied.)

The second pertinent decision of the National Labor Relations Board interpreting such proviso is that of *Minneapolis Star & Tribune Co.* (1954), 109 N.L.R.B. 727. There the board was concerned with a $500 fine which had been imposed by the union on a member, one Carpenter, because of his failure to take part in picketing during a strike. The board approved the holding of its trial examiner that the proviso of sec. 8(b)(1)(A) of the Labor Management Relations Act precluded it from interfering with the imposing of such fine by the union. There was incorporated into the decision the report of the trial examiner. It appears from such report that the general counsel for the board took the position that the imposition of such fine constituted an act of coercion prohibited by such sec. 8(b)(1)(A). The trial examiner rejected such contention and declared (p. 738):

> "Congressional recognition of a labor organization's right to make its own rules presumes, of course,

its right to invoke them—except where the implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights."[1]

One of the most-recent decisions by the National Labor Relations Board, in which it was called upon to interpret such proviso, is *Allen-Bradley Co.* (1960), 127 N.L.R.B. No. 8. There the company, as a condition to entering into a new collective-bargaining agreement with the union, insisted that the union agree in principle to certain company-proposed contract clauses. Under these clauses the union would be precluded from restraining or coercing any of its members by "discipline, discharge, fine, or otherwise" from exercising any of their rights guaranteed by sec. 7 of the Labor Management Relations Act. Thus such a cause would have prohibited the union from fining members who crossed a picket line and continued to work during a strike in violation of the union's constitution and by-laws. The board in its decision stated:

"Respondent [employer] has, by the breadth of this clause, encompassed in its proposals, and sought to bargain about, virtually every form of internal union discipline, including disciplinary powers expressly reserved to unions by the proviso to sec. 8(b)(1)(A) of the act. . . . By thus intruding on *rights guaranteed* to unions by the act, respondent's proposed clauses clearly fall outside the scope of mandatory bargaining. Accordingly, we find that respondent violated sec. 8(a)(5)[2] by insisting at

[1] In the instant appeals no question was raised that the provisions of the union's constitution and by-laws providing for the imposition of fines upon the employees, who crossed the picket lines, violated the employment rights of such employees.

[2] Sec. 8(a)(5) of the act, 29 USCA, p. 258, sec. 158, is the provision which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

negotiations that the union agree to such proposals." (Emphasis supplied.)

The foregoing quotations from decisions of the National Labor Relations Board make it abundantly clear that such board interprets the proviso as having the effect of making the enforcement by a union of its own constitution and by-laws a protected activity under the Labor Management Relations Act. We deem that such interpretation is certainly a permissible one in view of the use by the congress of the word *"right"* in the proviso when referring to the union activity of prescribing rules for acquisition and retention of membership.

Therefore, we conclude that such interpretation by the National Labor Relations Board is controllig on the issue of pre-emption, and that W.E.R.B. was without jurisdiction in the instant proceedings.

By the Court.—Judgments reversed, and causes remanded with directions in Case No. 59 to vacate and set aside the order of the Wisconsin Employment Relations Board

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WISCONSIN SUPREME COURT DECISION IN LODGE 78 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO vs. W.E.R.B.

October 4, 1960

APPEAL from two judgments of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Reversed.*

In Case No. 81 the Wisconsin Employment Relations Board (hereinafter referred to as "W.E.R.B.") petitioned the circuit court pursuant to sec. 111.07(7), Wis.

Stats., for enforcement of an order by W.E.R.B. requiring Lodge 78 of the International Association of Machinists, A.F.L.-C.I.O. (hereinafter referred to as the "union"), to cease and desist from attempting to collect certain fines from 12 of its members. In Case No. 82, the union petitioned the circuit court pursuant to the Wisconsin Administrative Procedure Act (ch. 227, Stats.) for review of this same order entered by W.E.R.B. The two proceedings were consolidated by the circuit court for the purpose of hearing and determination.

At all times material to the instant litigation the union was the certified collective-bargaining agent for the employees employed in the toolroom of the Milwaukee plant of the Allen-Bradley Company (hereinafter referred to as the "company"). The company is one whose business affects interstate commerce within the meaning of the Labor Management Relations Act, 1947. On September 1, 1956, the union called a strike at such plant, which strike terminated in the last week of such month.

During the strike 14 members of the union crossed the union's picket line and continued to work for the company. After the conclusion of the strike, such 14 members were tried by the union on charges that their conduct constituted a violation of the union's constitution and by-laws, and each was fined $100. Such members made no appearance before the trial committee and were tried *in absentia*. Demand was made upon each of the 14 for payment of such fines and on January 24, 1957 the union instituted 14 separate actions in the civil court of Milwaukee county to collect such fines. Such actions are still pending.

The 14 affected employees filed charges with the National Labor Relations Board accusing the union of an

unfair labor practice in levying such fines and attempting to collect them. The general counsel for such board, in Opinion F-198, dated October 28, 1957, refused to take action on the ground that the conduct of the union was not an unfair labor practice under the proviso appearing in sec. 8(b)(1)(A) of the Labor Management Relations Act, 29 U.S.C.A., p. 258, sec. 158(b)(1)(A).

Two of the 14 employees filed an action in the United States district court for the district of Columbia to compel the National Labor Relations Board and its general counsel to issue a complaint against the union, which litigation is also pending.

The remaining 12 of these 14 employees filed complaints with W.E.R.B. charging the union with an unfair labor practice under the Wisconsin Employment Peace Act (ch. 111, Wis. Stats.). In its answers the union alleged that W.E.R.B. had no jurisdiction to act in the matter and denied that any violation of the Wisconsin Act had been committed.

The hearing before the W.E.R.B. was held on August 28, 1958, at which time all of the facts were stipulated by counsel. On November 21, 1958, W.E.R.B. made certain findings of fact and conclusions of law which held that the activities of the union were regulated by the Labor Management Relations Act, as amended, and that, therefore, W.E.R.B. had no jurisdiction of the subject matter. W.E.R.B. unanimously dismissed the complaints.

On December 9, 1958, complainants moved W.E.R.B. for a rehearing, and on January 14, 1959, such motion for rehearing was granted. Hearing was again held by W.E.R.B. on February 4, 1959, at which time further argument was had and no further facts adduced.

On April 27, 1959, two of the three members of W.E.R.B. filed amended findings of fact and conclusions of law in which they found that W.E.R.B. had jurisdiction of the subject matter and that a violation of the Wisconsin Employment Peace Act was committed. Affixed to such findings and conclusions was an order directing the union to cease attempting to collect the fines imposed and to set aside the fines. The two-member majority also filed a memorandum accompanying such order.

The minority member filed a memorandum of dissent in which he objected to W.E.R.B. asserting jurisdiction; he further disagreed with the majority holding that a violation of state law had been committed.

The union then petitioned for review of such order in the circuit court, and W.E.R.B. sought a judgment of enforcement of its order from such court. Separate judgments in each proceeding were entered under date of April 22, 1960. One dismissed the union's petition for review and the other decreed enforcement of W.E.R.B.'s order. From such judgments the union has appealed.

For the appellant there were briefs by *Robert E. Gratz*, attorney, and *Daniel L. Schneidman* of counsel, both of Milwaukee, and oral argument by *Mr. Gratz*.

For the respondent the cause was argued by *Beatrice Lampert*, assistant attorney general, with whom on the brief were *John W. Reynolds*, attorney general, and *Jay Schwartz*, attorney.

CURRIE, J. The same issue of federal pre-emption under the Labor Management Relations Act, 1947, 29 USCA, p. 151 *et seq.*, secs. 151 to 187, is presented here as in *Local 248, U. A., A. & A. I. Workers v. Wisconsin*

E. R. Board, ante, p. 277, 00 N. W. (2d) 000. Therefore, our decision this day rendered in such case governs the outcome in the instant appeals, and requires that the judgments below be reversed.

By the Court.—Judgments reversed, with directions in Case No. 82 that the order of the Wisconsin Employment Relations Board be vacated and set aside.